In The

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-... 76-706

MARITIME TERMINALS, INC. and
AETNA CASUALTY AND SURETY CO.,
Petitioners,

v.

DONALD D. BROWN and
VERNIE LEE HARRIS and
THE SECRETARY OF LABOR, and
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

# BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

CHARLES S. MONTAGNA
JOHN H. KLEIN
Breit, Rutter & Montagna
720 Atlantic National Bank Bldg.
415 St. Paul's Blvd.
Norfolk, Virginia 23510

Attorneys for Respondents

TABLE OF CONTENTS



TABLE OF AUTHORITIES

Cases







Statutes

In The

SUPREME COURT OF THE UNITED STATES

October Term 1976

---

No. 76-...

---

MARITIME TERMINALS, INC. and
AETNA CASUALTY AND SURETY CO.,
Petitioners,

v.

DONALD D. BROWN and
VERNIE LEE HARRIS and
THE SECRETARY OF LABOR, and
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

---

BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI

---

CHARLES S. MONTAGNA
JOHN H. KLEIN
Breit, Rutter & Montagna
720 Atlantic National Bank Bldg.
415 St. Paul's Blvd.
Norfolk, Virginia 23510

Attorneys for Respondents

In The

SUPREME COURT OF THE UNITED STATES

October Term 1976

---

No. 76-...

---

MARITIME TERMINALS, INC. and
AETNA CASUALTY AND SURETY CO.,
Petitioners,

v.

DONALD D. BROWN and
VERNIE LEE HARRIS and
THE SECRETARY OF LABOR, and
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

---

BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI

---

Respondents respectfully submit that there is no justiciable controversy before this Court, because the insurer complied with the Administrative Law Judge's Order.

REASONS FOR DENYING THE WRIT

The Administrative Law Judge found that both Claimants, Brown and Harris, were covered by the Longshoremen's and Harbor Workers Compensation Act and entitled to its benefits. Thereupon, the insurer, Aetna Surety and Casualty Company, paid the award. The case was appealed to the Benefits Review Board and then to the United States Court of Appeals for the Fourth Circuit, which both upheld coverage under the Act.

While the argument was not raised below, Respondent now respectfully submits that because of the insurer's compliance with the Administrative Law Judge's Order, there is no justiciable controversy before this Court. The issues have become moot. Though this argument was not raised during the proceeding below, this Court nonethe-



less must take cognizance of the argument, for it goes to this Court's jurisdiction. The Court would be obligated to consider the question of mootness even if neither of the parties raised it. Western Addition Community Organization v. Alioto, 514 F.2d 542, 544, n.2 (9th Cir. 1975).

> "mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions.'" North Carolina v. Rice, 404 U.S. 244, 246 (1971).

Federal Court impotence to review moot cases derives from the Article Three requirement that the judicial power shall extend only to "cases" and "controversies." Id; Allen v. Likens, 517 F.2d 532 (8th Cir. 1975). To be cognizable in a Federal Court an action

> "...must be a real and substantial controversy admitting a specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical

> state of facts." Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937).

Furthermore, a "case" or "controversy" must exist at all stages of the litigation and not merely at the time the complaint is filed. Allen v. Likens, supra, at 534. And

> "where the court becomes aware that there is no jurisdiction (whether initially or on appeal) it must, even of its own motion, dismiss." Cover v. Schwartz, 133 F.2d 541, 546 (2nd Cir. 1942).

Simply put, if a case is moot, this Court lacks jurisdiction. Mills v. Green, 159 U.S. 651 (1895).

The factual situation before the court today is exactly the kind of situation in which Federal Courts have previously found a lack of a justiciable controversy. The Court of Appeals for the Second Circuit faced the same question on similar facts in the Pittston Stevedoring Corporation



v. Dellaventura case, _____F.2d _____ Docket No. 76-4042 (1976). That court dismissed an appeal by the stevedore, where the insurer paid the award after the Administrative Law Judge's decision. The same facts present in Pittston are present in the cases here before the Court. After the Administrative Law Judge's decision in Brown and Harris, the insurer paid the awards. (See letters of September 11, 1974, from Aetna to Attorney for Brown and Attorney for Harris, included in Appendix).

The Aetna letters of September 11, 1974, show that Aetna is complying fully and completely with the orders of the Administrative Law Judge. The exact words are "We have attempted to comply fully with the Order." Aetna thereby agreed to follow the Administrative Law Judge's

order. Moreover, Aetna made the payments and complied with the order before the order had any coercive effect. See Harris v. Briscoe, 212 F.2d 619 (D.C. Cir. 1954), where the Court said that a Deputy Commissioner's award had no coercive effect. The Court said

> "By express provision of the Acts, the only methods of enforcement available to a beneficiary are those set out in §21 (c) and §18, each of which requires a new proceeding in the District Court, separate and distinct from that in which the award is reviewed under §21(b)." (at 621)

As amended in 1972, 33 U.S.C. §921(e) states specifically that proceedings for enforcing a compensation order may be instituted only as provided in §921(d) or §918. Thus, it still requires an order from a United States District Court to enforce compliance with a compensation order. Had Aetna not chosen to comply



with the order, claimants Brown and Harris would have had to follow the statutory procedures for enforcement. Aetna, however, chose to abide by the award. It complied with the order. Aetna accordingly, has no basis for an appeal.

It is well settled that the duty of this Court

> is to decide actual controversies by a judgment which can be carried into effect; and not to give opinions upon moot questions or abstract propositions, or declare principles or rules of law which cannot affect the matter in issue in the case before it.

Mills v. Green, supra at 653. This court has reaffirmed that proposition in several recent cases. Local No.8-6, Oil, Chemical, and Atomic Workers International Union v. Missouri, 361 U.S. 363 (1960); North Carolina v. Rice, supra; DeFunis v. Odegaard, 416 U.S. 312 (1974). It is therefore be-

yond dispute that federal courts are without power to decide questions that cannot effect the rights of the litigants in the case before them.

Here, it is clear that the award has already been paid. It has sometimes been said that the general rule in federal courts is that payment of a judgment does not foreclose an appeal. Woodson v. Chamberlain, 317 F.2d 245 (4th Cir. 1963); Leader Clothing v. Fidelity and Casualty Company of New York, 227 F.2d 574 (10th Cir. 1955). There are, however, important limits on that generalization. Woodson recognized, for example, that the general rule applied "...so long as, upon reversal, restitution can be enforced...." 317 F.2d at 246. This Court itself has also said that payment of a judgment under circumstances where repayment or restitution



could not be obtained in event of a reversal bars an appeal. Little v. Bowers, 134 U.S. 547 (1890).

Even if this Court were to reverse the Administrative Law Judge's award, the insurer could still not get its payments back. The Courts have not ordered claimants to return payments made erroneously under the statute. See, for example, Bethlehem Shipbuilding Corp. v. Cardillo, 102 F.2d 299 (1st Cir. 1939), where an award was modified by the Deputy Commissioner, but the claimant was not required to pay back any compensation previously paid by the insurer. See also Massey v. Williams-McWilliams, Inc., 414 F.2d 675 (5th Cir. 1969), where an employer was not entitled to repayment of compensation benefits erroneously paid to a seaman who recovered damages under the Jones Act.

Even Petitioner has recognized that the payments made to claimants, Brown and Harris, probably cannot be recouped, even if this Court should decide they were not entitled to federal compensation benefits. (Petition pg.13). Thus, effective relief has been precluded.

Where events have occured which preclude granting effective relief to an appellant, an appeals court will dismiss the appeal. Leader, supra, at 574; Chicago Great Western Railway Co. v. Beecher, 150 F.2d 394 (10th Cir. 1945).

Finally, the rule has been stated by this Court that where the order appealed from has been complied with, and the controversy thereby extinguished, the appellate court will not proceed to judgment. American Book Company v. State of Kansas, 193 U.S. 49, 24 S.Ct. 394 (1904).



As the court stated succinctly, "After compliance there is nothing to litigate." 24 S.Ct. at 396. That analysis is dispositive of these cases. Liability has been determined against both the insurer and the insured. The insurer has agreed to comply fully with the Administrative Law Judge's order and has paid the award in full with its funds. The insured has no interest in appealing the award at this stage, for it has no interest in the funds of the insurer. A party who has no interest in a fund cannot appeal from an order disbursing that fund. Seaboard Surety v. United States, 306 F.2d 855 (9th Cir. 1962). See also In Re Michigan-Ohio Building Corp., 117 F.2d 191, 193 (7th Cir. 1941), where the court said:

> Generally accepted is the legal tenet that no one may appeal from a judgment unless he has an interest therein direct, immediate, pecuniary,

> and substantial. Speaking more specifically, a party has an appealable interest only where his property may be diminished, his burdens increased, or his rights detrimentally effected by the order sought to be reviewed.

In Brown and Harris, the insured lacks the requisite direct, immediate, pecuniary and substantial interest. The insured's property is not being diminished, for the insurer has paid the judgment in full. Nor are the insured's burdens increased, for it has paid no part of the award, nor will it be called upon to do so. The insured therefore fails to meet the tests for an appealable interest and this Court should accordingly refuse to grant the requested writ of certiorari.

## CONCLUSION

For the reasons stated herein, we respectfully urge the Court to deny the Petition for Certiorari and leave



standing the decisions below.

Respectfully submitted,

CHARLES S. MONTAGNA
JOHN H. KLEIN
Breit, Rutter & Montagna
720 Atlantic National Bank Bldg.
415 St. Paul's Blvd.
Norfolk, Virginia 23510

Attorneys for Donald D. Brown and Vernie Lee Harris

APPENDIX

Ætna
LIFE & CASUALTY

Casualty & Surety Division
P. O. Box 3171
Norfolk, Virginia 23514
(804) 622-1341

Received and Petson - 9/11/74
JP

September 11, 1974

Mr. Charles S. Montagna
Attorney at Law
720 Atlantic National Bank Building
Norfolk, Virginia 23510

Dear Mr. Montagna:

RE: OUR INSURED: MARITIME TERMINALS, INC. - OUR FILE: S(K) 50 CC 82062 RG - CLAIMANT: DONALD BROWN - DATE OF ACCIDENT: 5-9-73

We have in our posession a copy of the Compensation Order entered by the U.S. Department of Labor on the above captioned accident. We have attempted to comply fully with the Order. However, due to the complexity of the case and the numerous payments made to Mr. Brown under the Virginia Compensation Act it took us a few days to determine the amount of money owed Mr. Brown under the Federal Act. We believe we have now computed the amount due to Mr. Brown. According to our computations Mr. Brown was due a total of $8,013.14 in compensation as awarded him by Judge Capps. Furthermore, according to our calculations the interest due on this amount is $144.25. Therefore, our payment to Mr. Brown should have amounted to $8,157.39. However, since we have already paid $4,900 under the terms of the Virginia Compensation Act we now owe Mr. Brown a balance of $3,257.39. A draft in this amount is herewith enclosed. This draft should satisfy the first paragraph of Judge Capps' Order.

In accordance with the second paragraph of the Order we enclose our draft for $3.00 made payable to Dr. George N. Cavros, a draft for $562.50 made payable to Dr. Robert Thrasher and a draft for $4.00 made payable to Dr. Herbert Brewer.

In compliance with the third paragraph of the Order we enclose a draft in the amount of $2,054.25. This sum is meant to reimburse you the amount of $1,741.25 for legal services rendered Mr. Brown plus the sum of $313 for approved costs and expenses. Furthermore, upon receipt of further information from you relative to the witness fee and mileage due Mr. Alex Hall, we will be happy to forward you a draft for that expense.

If you have any questions at all concerning any matter covered herein, please do not hesitate to call or write.

Very truly yours,

Donald J. Loch

Donald J. Loch
Claims Supervisor

DJL/mhl

Ætna
LIFE & CASUALTY

Casualty & Surety Division
P. O. Box 3171
Norfolk, Virginia 23514
(804) 622-1341

Received in Person - 9/11/74

September 11, 1974

Mr. Stuart Carter
720 Atlantic National Bank Building
Norfolk, Virginia 23510

Dear Mr. Carter:

RE: OUR INSURED: MARITIME TERMINALS, INC. - OUR FILE: S(K) 50 CC 83570 MR - CLAIMANT: VERNON L. HARRIS
DATE OF ACCIDENT: 7-3-73

We have before us a copy of the Compensation Order filed by the U.S. Department of Labor with respect to the above captioned claim. It has been our desire and intention to fully comply with this Order. However, due to the complexities encountered in determining the amount of interest owed Mr. Harris more time than usual was required.

According to our calculations Mr. Harris was due a total of $592 in compensation benefits under the Longshoremen and Harbour Workers Act. The interest on this amount computed through September 11, 1974 amounts to $24.29. Therefore, the total amount due Mr. Harris was $616.29. However, we have already paid Mr. Harris $240 under the Virginia Compensation Act. Consequently, we enclose our draft in the amount of $356.29 to make up the balance due and to comply with the first paragraph of Judge Howder's Order.

With respect to the second paragraph of the Order, our records indicate that all medical bills have been paid. If you know of any unpaid bills, kindly advise.

In accordance with the fourth paragraph of the Judge's Order we enclose our draft in the amount of $1,500 made payable to you as reimbursement for legal services rendered Mr. Harris.

With respect to the final paragraph in the Judge's Order please advise what witness fees and mileage charges are due Mr. Hall and we will be happy to remit a draft in payment of same.

If you have any questions at all concerning anything covered here, please do not hesitate to call or write.

Very truly yours,

Donald J. Loch

Donald J. Loch
Claims Supervisor

DJL/mhl